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Defensive Lawyering Revisited: Part 2, During the Representation

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Last month, we started looking at what I call “defensive lawyering”—managing your practice in a way that tries to reduce civil and regulatory risk by documenting the key milestones in a representation. Last month’s column focused on the beginning of a representation. Next month, we’ll look at concluding a representation. This month, we’ll examine three areas that can arise during a representation where defensive lawyering applies: (1) documenting major client decisions; (2) obtaining waivers for conflicts that arise after a representation begins; and (3) modifying fee agreements midstream.

Documenting Major Client Decisions. When we begin a new matter, we all hope that it will produce a good result for the client and that the client will appreciate the skill and hard work that went into obtaining that good result. At the same time, we also know that not all representations turn out that way for a variety of reasons. Sometimes the reason is that the client made a major decision against our advice or took a calculated risk that didn’t play out. In those instances, it is important to document who made the call that produced that result. Even with the best of intentions and honorable motives, memories fade and recollections can vary from reality. It’s also human nature to “second-guess”

when events go sour. In the absence of clear documentation, some of that second-guessing may be pointed in the lawyer's direction.

Documenting key client decisions need not necessarily be elaborate or overly detailed. Although the significance of the client's decision in the context of a particular case or transaction will dictate the level of detail involved, a quick email to the client following a telephone call, a reply email or even a time sheet entry will often suffice. It is the contemporaneous record that will be important later. Confirming key decisions with the client also fosters clear communication between the lawyer and the client. Copying clients on all correspondence serves that same useful purpose—both for the lawyer and the client. The lawyer will have contemporaneously informed the client how agreed strategy is being implemented, and the client will have the opportunity to raise any questions immediately.

Midcourse Conflict Waivers. We usually think of conflicts and conflict waivers as occurring at the outset of a representation. Conflicts can, however, arise once a representation has already begun. We need to be attentive to possible conflicts as a representation proceeds and, if a conflict arises, we need to obtain appropriate waivers (assuming the conflict is waivable). (Under the so-called "hot potato" rule, a client cannot be "fired" mid-matter to "cure" a conflict. See OSB Formal Ethics Op. 2005-11 at 2 n.1, citing *Unified Sewerage Agency v. Jelco*, 646 F2d 1339, 1345 n.4 (9th Cir 1981) (applying Oregon law).)

OSB Formal Ethics Opinion 2005-123 (at 2) puts it this way:

“Pursuant to Oregon RPC 1.0(h), a lawyer is charged with knowledge of facts that the lawyer knew, or by the exercise of reasonable care should have known, that pertain to the existence of a conflict. . . . In addition, the nature of a conflict situation—and the lawyer’s resulting duties—can change over time. If, for example, a situation in which a waivable conflict is present turns into one in which a nonwaivable conflict is present, the lawyer must withdraw. If a situation in which no conflict was present turns into one in which a waivable conflict is present, a lawyer may continue only with consent based on full disclosure.” (Citations omitted.)

Modifying Fee Agreements. As we discussed last month, the best time to deal with hourly rate increases is at the outset of a representation by building a mechanism for periodic adjustment into your engagement agreement with the client. But, sometimes that hasn’t happened or the nature of the modification involved is beyond the scope of the mechanism included in the engagement agreement. (This situation should be distinguished from one where the lawyer is taking on new or separate work for a client—even if related to earlier work. That situation is governed by the contract formation rules we discussed last month.) Once an attorney-client relationship has been formed, a lawyer’s ability to bargain with a client over the financial aspects of the arrangement is constrained

by the lawyer's fiduciary duty to the client. See *In re Obert*, 336 Or 640, 649, 89 P3d 1173 (2004) (noting that lawyers are fiduciaries for their clients); *Sabin v. Terrall*, 186 Or 238, 250, 206 P2d 100 (1949) (observing that fee modifications will be “closely scrutinized by the courts” for this reason).

The Oregon Court of Appeals in *Welsh v. Case*, 180 Or App 370, 382-83, 43 P3d 445 (2002), found that whether a fee modification that includes taking a lien in a client's real property constitutes a business transaction with a client (thereby triggering the heightened conflict waiver standards now found in RPC 1.8(a)) depends on a “case-by-case determination.” Regardless, OSB Formal Ethics Opinion 2005-97 (at 2) concludes regarding all fee modifications:

“A modification of a fee agreement in the lawyer's favor requires client consent based on an explanation of the reason for the change and its effect on the client. . . . In addition, the modification must be objectively fair.”

In addition to ethical and practical considerations counseling carefully documenting in writing the basis and particulars of a fee modification, there is also an important contractual reason: the parol evidence rule. If your initial written agreement with your client is fully integrated, the parol evidence rule (ORS 41.740) may bar evidence of a modification that is not also in writing. See *Varner v. Eves*, 164 Or App 66, 72, 990 P2d 357 (1999) (discussing the application of the parol evidence rule to lawyer fee agreements).

Summing Up. The twin threads of defensive lawyering are clear communication with the clients and documentation of those communications that the lawyer can rely on later. Both the communication and the record are as central to decisions made during a representation as those that frame it at the beginning and close it at the end.

ABOUT THE AUTHOR

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